



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 19 2002

Ms. Cynthia Villarreal-Reyna
Section Chief
Legal & Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2002-7290

Dear Ms. Villareal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174129

The Texas Department of Insurance (the "department") received a request for "each and every page and document, including notes and memo's [sic]" relating to a particular agency licensed by the department. You state that some of the requested information will be released to the requestor but claim that the information you have submitted for our review is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 3 of article 21.49-1 of the Insurance Code provides that "[e]very insurer which is authorized to do business in this State and which is a member of an insurance holding company system shall register with the commissioner . . ." and further specifies the types of information to be provided to the department. You inform us that such information is provided to the department in a specified form known as "Form B." See 28 T.A.C. § 7.210. Section 10 of article 21.49-1 provides as follows:

All information, documents and copies thereof obtained by or disclosed to the commissioner or any other person . . . pursuant to Section 3, shall be given confidential treatment and shall not be subject to subpoena and shall not be made public by the commissioner or any other person . . . without the prior written consent of the insurer to which it pertains unless the commissioner,

after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interests of policyholders or the public will be served by the publication thereof, in which event he may publish all or any part thereof in such manner as he may deem appropriate.

You do not indicate that the commissioner has determined that the interests of policyholders or the public will be served by the publication of the requested Form B, nor do you indicate that the requestor has provided the department with the required written consent from the insurer. We therefore conclude that in this instance the department must withhold the requested Form B pursuant to section 552.101 of the Government Code in conjunction with section 10 of article 21.49-1 of the Insurance Code.

You assert that other information is excepted under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). The privilege extends to communications "between the client or a representative of the client and the client's lawyer or a representative of the lawyer." Tex. R. Evid. 503(b)(1)(A). This office recently refined this position and determined that when a governmental body demonstrates that a communication is protected by the attorney-client privilege as defined by rule 503, the entire communication is excepted from disclosure under section 552.107. Open Records Decision No. 676 at 5 (2002). A governmental body that raises section 552.107 bears the burden of explaining how the particular information requested is protected by the attorney-client privilege. *Id.* at 6; *see also Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).

You indicate that the information you have marked "include[s] correspondence and other communications between [department] attorneys and representatives of [the department]." In addition, you have identified the parties to these communications. Having considered your arguments and reviewed the submitted documents, we agree that the communications that you have identified reflect attorney advice or opinion and may therefore be withheld under section 552.107(1).

You also assert that one of the submitted documents constitutes an intra- or inter-agency memoranda that is protected under section 552.111 of the Government Code. This section excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. After reviewing the letter at issue, we have determined that it constitutes a draft of a policymaking document, which may be withheld under section 552.111 but only if a final version of this document was released or is intended for release.

In summary, the department must withhold the submitted "Form B" under section 552.101 as information made confidential by law. The department may withhold the submitted attorney-client communications under section 552.107 and the submitted draft letter under section 552.111, but only if a final version of the document was released or is intended for release.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy", with a long horizontal flourish extending to the right.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 174129

Enc. Submitted documents

c: Mr. Melvin D. Clanton
P.O. Box 80115
Austin, Texas 78727
(w/o enclosures)